have noted,[20] Bethlehem's principles appear to go quite far in relaxing the traditional requirements governing when a state may pursue an armed response under Article 51 of the UN Charter. The natural consequence of Bethlehem's proposal, should governments decide to follow it, is additional armed responses against nonstate actors in circumstances that do not constitute armed conflict. In these circumstances, the applicable provisions of international human rights law—not IHL—must govern any use of force. Bethlehem, unfortunately, does not even mention international human rights law, let alone insist on its applicability, in his proposal.

We recall then White House Counsel Alberto Gonzales's notorious dismissal of provisions of the Geneva Conventions as "quaint."[21] While Bethlehem's proposal is couched in terms much more respectful of the international legal lexicon, it threatens to undermine settled principles of *jus ad bellum*, *jus in bello*, and human rights law. It is a radical rewrite that, if implemented, would tilt a necessarily imperfect but finely tuned balance from peace to war and from life to death.

SELF-DEFENSE AGAINST NONSTATE ACTORS: REFLECTIONS ON THE "BETHLEHEM PRINCIPLES"

*By Elizabeth Wilmshurst and Michael Wood**

Daniel Bethlehem has set down sixteen principles relevant to the scope of a state's right of self-defense against an imminent or actual armed attack by nonstate actors "with the intention of stimulating a wider debate."[1] While these principles "are published under [the author's] responsibility alone," they have "nonetheless been informed by detailed discussions over recent years with foreign ministry, defense ministry, and military legal advisers from a number of states who have operational experience in these matters."[2]

Exercises such as this one are welcome if they seek to achieve as broad a consensus as possible on the interpretation of the rules of international law on the use of force and on their application. What is needed, if the rules are to be more readily obeyed, is a far greater degree of common understanding among governments (and others) as to what the rules are, as well as greater support for the United Nations, and particularly for a Security Council that is effective and seen to be legitimate.

[20] *E.g.*, Mary Ellen O'Connell, *Dangerous Departures*, 107 AJIL 380, 380, 383–84 (2013); Elizabeth Wilmshurst & Michael Wood, *Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles,"* 107 AJIL 390, 393–95 (2013).

[21] Memorandum from Alberto Gonzales, White House Counsel, to President George W. Bush, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, at 2 (Jan. 25, 2002), a*vailable at* http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf.

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[1] Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AJIL 769, 773 (2012).

[2] *Id.*

https://doi.org/10.5305/amerjintelaw.107.2.0390 Published online by Cambridge University Press

Attempts to reach agreement on the international law on the use of force are not new. The Chatham House Principles of International Law on the Use of Force in Self-Defence were drawn up in 2005 following discussion among academics, legal practitioners in the United Kingdom, and current and former legal advisers to the UK Foreign and Commonwealth Office.[3] The Chatham House principles were "intended to provide a clear statement of the rules of international law 'properly understood' governing the use of force by states in self-defence";[4] they included discussion of the use of force against nonstate actors. A wider exercise, involving government advisers, academics, and legal practitioners from a number of states, was undertaken under the auspices of the Dutch government and concluded in April 2010 with the Leiden Policy Recommendations on Counter-terrorism and International Law.[5] Its aims were "to address the challenges that combating international terrorism poses to international law,"[6] and the recommendations included material on the use of force against terrorist groups. The International Law Association's Committee on the Use of Force, which has a wide composition, is currently working on related matters.[7]

The processes for these principles and recommendations have included persons with governmental experience, including the present authors. But Bethlehem gives particular emphasis to the governmental participation in the exercise in which he was involved. Attempts in the United Nations to secure endorsement of principles about self-defense have not been successful,[8] and the governmental discussions that lie behind Bethlehem's principles no doubt anticipated that a select group of government representatives might reach agreement among themselves when the UN membership as a whole could not.[9]

This emphasis on governmental participation is explained by a key factor motivating Bethlehem's approach: it is what he describes as a doctrinal divide "between those who favor a

[3] Published as Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMP. L.Q. 963 (2006) [hereinafter Chatham House Principles].

[4] *Id.* at 963.

[5] Published as Nico Schrijver & Larissa van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law*, 57 NETH. INT'L L. REV. 531 (2010) [hereinafter Leiden Recommendations]; *see also* COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER: MEETING THE CHALLENGES (Larissa van den Herik & Nico Schrijver eds., forthcoming 2013) (discussing the Leiden recommendations).

[6] Leiden Recommendations, *supra* note 5, at 533.

[7] *At* http://www.ila-hq.org/en/committees/index.cfm/cid/1036.

[8] Kofi Annan, when secretary-general, attempted to facilitate agreement by setting up the High-Level Panel on Threats, Challenges and Change. Its 2004 report, *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change*, UN Doc. A/59/565 (2004), addressed the issues, as did the secretary-general's response *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005 (2005). But agreement on detailed statements in this area eluded the UN General Assembly, and the resolution adopting the World Summit Outcome did not go much beyond the important reaffirmation that "the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security." 2005 World Summit Outcome, GA Res. 60/1, para. 79 (Sept. 16, 2005).

[9] The discussions have been referred to publicly by former State Department legal adviser John Bellinger III, for example in his remarks to the International Bar Association on October 8, 2010:

> When I was Legal Adviser, in 2006, I began a series of discussions on counter-terrorism legal issues between the U.S. and EU countries. The purpose was not to try to reach a consensus, but simply to try to understand each other's concerns. In 2007, I began at West Point a focused dialogue with a smaller but geographically more diverse group of countries who face serious terrorist threats and also engage in international military operations. I am pleased that both of these dialogues have been continued by the Obama Administration. Indeed, the sixth meeting of the West Point group of countries was held here in Vancouver just two weeks ago.

restrictive approach to the law on self-defense and those who take the view that the credibility of the law depends ultimately upon its ability to address effectively the realities of contemporary threats."[10] Although at one point we are told that the new principles are "not intended to be enabling of the use of force,"[11] the author's standpoint appears clear:

> The reality of the threats, the consequences of inaction, and the challenges of both strategic appreciation and operational decision making in the face of such threats frequently trump a doctrinal debate that has yet to produce a clear set of principles that effectively address the specific operational circumstances faced by states.[12]

So the first question for a reader of the Bethlehem principles is whether they are intended either to reflect existing law or, instead, to state what, in the view of some, operational requirements demand. Bethlehem's explanations leave some doubt. A footnote tells us that the principles "do not purport to reflect a settled view of the law or the practice of any state."[13] What then? While not accompanied by detailed commentaries, the principles are preceded by an illuminating note.[14] They are said to be an attempt to propose what "the appropriate principles are, and ought to be."[15] They are described as setting out "the contours of the law" and as "intended to work with the grain of the UN Charter as well as customary international law."[16] They are said to be "indicative, rather than exhaustive, of elements of a state's right of self-defense against an imminent or actual armed attack by nonstate actors."[17] And we read that "[t]heir intent is to reflect, as well as shape, the conduct of states."[18]

In addition, the principles are stated to be "without prejudice to the application of the UN Charter, including applicable resolutions of the UN Security Council relating to the use of force, or of customary international law."[19] Such a caveat may be advisable, but it may imply that the principles themselves may not necessarily reflect the Charter or customary law. Room is left for a right of self-defense in circumstances other than those dealt with in the principles, and this right is said to refer not only to attacks against a state but also against its "imperative

John B. Bellinger III, Remarks at the Rule of Law Symposium, International Bar Association (Oct. 8, 2010), *available at* http://www.arnoldporter.com/resources/documents/Rule%20of%20Law%20Symposium_John%20Bellinger.pdf.

[10] Bethlehem, *supra* note 1, at 773.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 775 n.*

[14] *Id.* at 770–74. The note usefully highlights British statements on the issues, though as regards the Foreign Affairs Committee it would have been better to have cited the foreign secretary's careful responses to the Committee's conclusions. For example, in response to the "conclusion" cited by Bethlehem, 106 AJIL at 773 n.13, the foreign secretary essentially repeated the relevant parts of the attorney general's statement of April 21, 2004, saying inter alia that "international law permits the use of force in self-defence against an imminent attack, but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote" and that "[i]t is an important condition of military action in self-defence that it should only be used as a last resort. It must be necessary to use force to deal with the particular threat that is faced." Response of the Secretary of State for Foreign and Commonwealth Affairs to the House of Commons Foreign Affairs Select Committee, SEVENTH REPORT: FOREIGN POLICY ASPECTS OF THE WAR AGAINST TERRORISM 2003–04, Cm 6340, at 40–41 (Sept. 2004), *available at* http://www.bits.de/public/documents/US_Terrorist_Attacks/SecResp0904.pdf.

[15] Bethlehem, *supra* note 1, at 770.

[16] *Id.* at 773.

[17] *Id.* at 774.

[18] *Id.*

[19] *Id.* at 777, princ. 14.

interests."[20] Finally the principles are also stated to be "without prejudice to the application of any circumstance precluding wrongfulness or any principle of mitigation that may be relevant."[21] These three provisos may cause the reader to wonder about the purpose of the principles if they have to be subordinated or sidestepped in these ways.

The principles nevertheless contain some important material. Principle 1 states unequivocally: "States have a right of self-defense against an imminent or actual armed attack by nonstate actors."[22] And principles 11 and 12 recognize that if the state from whose territory the nonstate actor is operating is unable or unwilling to prevent attacks, a threatened state may use armed force against the nonstate actor within that territory even without the territorial state's consent. These propositions remain controversial, but, like the Chatham House principles and Leiden recommendations, the Bethlehem principles rightly regard them as increasingly accepted in the practice and supporting statements of governments and international organizations.

The Bethlehem principles are indeed set within the general framework of international law and do not seek to introduce entirely new justifications for the use of force. They do not, for example, claim that the U.S. Authorization for Use of Military Force (AUMF) by its reference to "all necessary and appropriate force," or any other source, has introduced a new justification under international law to use force whenever necessity demands it.[23] We are still in the realm of self-defense. But there are some respects in which the new principles risk departing from international law. In this regard, it is instructive to look at the substantive differences between them and the Chatham House and Leiden texts.[24]

In discussing responses to armed attacks by nonstate actors, we are almost invariably in the counterterrorism context. While affirming that force must be a last resort, the new principles omit to mention that persons committing terrorist attacks are first and foremost criminals and should be dealt with as such if it is possible to do so. As the Leiden recommendations explain:

> All efforts should be made to exhaust means other than force to prevent and repress terrorist activities. States and the Security Council should give priority, wherever possible, to law enforcement measures and recognise that the use of force is a measure of last resort, to be employed only where absolutely necessary.[25]

The use of force in self-defense is a right only in the case of armed attack—actual or imminent. There is sometimes difficulty in determining what is an armed attack by a nonstate actor for this purpose. Both the Chatham House principles and the Leiden recommendations require that, in the case of attacks by groups not attributable to a state, the attack must be large-scale to trigger the right of self-defense.[26] The Leiden recommendations explain the heightened threshold as stemming

[20] *Id.*, princ. 15.

[21] *Id.*, princ. 16.

[22] *Id.* at 775, princ. 1.

[23] Authorization for the Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224 (2001) (reprinted at 50 U.S.C. §1541 note).

[24] Of course, the Chatham House principles and the Leiden recommendations may themselves be subject to criticism. *See, e.g.*, Mary Ellen O'Connell, *Dangerous Departures*, 107 AJIL 380, 384 (2013).

[25] Leiden Recommendations, *supra* note 5, at 540, para. 30.

[26] Chatham House Principles, *supra* note 3, at 969, princ. F; Leiden Recommendations, *supra* note 5, at 541, para. 39.

> from the critical role of the state(s) on whose territory terrorists operate and the primary responsibility of such state(s) for the prevention and suppression of such acts. [Article 51] recognizes that such a state or states would be affected by the force used in self-defence and ensures that self-defence and the consequences for that state or states that flow from a military response are not triggered too soon.[27]

The Bethlehem principles express no such caution. Indeed the difficult question of whether a series of "pinpricks" can together amount to an "armed attack" for the purpose of Article 51 of the Charter is addressed rather summarily: "The term 'armed attack' includes both discrete attacks and a series of attacks that indicate a concerted pattern of continuing armed activity."[28] This sentence raises the further question whether the necessity and proportionality criteria for the "defending" state can be assessed in relation to the series of attacks or only in relation to the last or next one.

As for the conditions for the use of self-defense, the reference in the principles to proportionality (i.e., self-defense "must be proportionate to the threat that is faced"[29]) is too terse to assist in understanding that criterion. A simple comparison between the threatened force and the force used in response does not reflect the law in this area.[30]

In the case of anticipatory self-defense, the use of defensive force is permissible only if the attack is "imminent." Having in mind that anticipatory self-defense is not accepted by all states, care must be taken that the right is not abused. The principles would have done well to insert cautionary words, as in the Chatham House principles, about the need for a good faith assessment of the facts: "The more far-reaching, and the more irreversible its external actions, the more a State should accept (internally as well as externally) the burden of showing that its actions were justifiable on the facts. And there should be proper internal procedures for the assessment of intelligence and appropriate procedural safeguards."[31]

The seventh Bethlehem principle would permit the use of armed force against those responsible for the "provision of material support essential to the attacks."[32] This assertion must be contrary to the *jus ad bellum* and, in most circumstances, to international humanitarian law, and not only if it puts banks and other financial institutions in the firing line. Considered against current policies of targeted killings, this and the accompanying principles are of serious concern.

Another area of concern relates to the circumstances in which a state may use force against a group in the territory of another state without the latter's consent. It is worth underlining the difficulties in both law and practice in this area. The Leiden recommendations state that

[27] Leiden Recommendations, *supra* note 5, at 541–42, para. 39.

[28] Bethlehem, *supra* note 1, at 775, princ. 4.

[29] *Id.*, princ. 3.

[30] The International Court of Justice affirmed a "specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, para. 41 (July 8) (quoting Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 176 (June 27)). The Chatham House principles require that the force used "taken as a whole, must not be excessive in relation to the need to avert the attack, or bring it to an end." Chatham House Principles, *supra* note 3, at 968, princ. E; *see also* Leiden Recommendations, *supra* note 5, at 542, para. 43.

[31] Chatham House Principles, *supra* note 3, at 968, princ. D cmt.; *see also* Leiden Recommendations, *supra* note 5, at 543, para. 48.

[32] Bethlehem, *supra* note 1, at 775, princ. 7.

> it is only exceptionally that the threatened state may take armed action in self-defence against a non-state actor in the territory of another state without first seeking the consent of that state. It will thus be only in the most compelling emergency that there will be necessity for the threatened state itself to take military action before an attack is launched.[33]

The Bethlehem principles, on the other hand, take the view that the consent of the territorial state may be implied and that "the failure or refusal to agree to a reasonable and effective plan of action" may put the state in collusion with the terrorists and thus legitimize use of force by a threatened state.[34] The detail given in the principles to questions of consent may reflect the concern of at least some of those taking part in the discussions that there be wide latitude to presume the consent of the territorial state—latitude that is doubtful under international law.

Finally, the Bethlehem principles omit points that might be expected in any discussion of the use of force by states. There is little reference to the role of the Security Council, no reference to the requirement to report measures taken in self-defense to the Council,[35] and no reference to the need to comply with international humanitarian and human rights law.[36] The difficulty of deciding whether individual terrorists are acting "in concert" with a geographically distant attacker, one of the most problematic issues in the so-called global war on terror, is ignored.

The publication of the principles raises questions on the sources of law in this field and on the process by which the law develops. The Chatham House and Leiden texts were attempts to state existing law rather than to develop it.[37] This exercise, on the other hand, seems to have the intention of developing customary international law through discussion and agreement on abstract principles. But "[w]hat I tell you three times is true"[38] is not an authoritative description of the formation of international law.

Bethlehem has shed light (how much we cannot tell) on what is done "largely away from the public gaze."[39] We welcome the fact that the author, and the editors of this *Journal*, are encouraging a debate, which should be a broad one, both in terms of those who take part and in terms of the experience and materials that they bring to the discussion. For many reasons, including those set out above, the suggested principles need to be approached with some caution. It is to be hoped that, especially for the governments involved in the discussions leading to the formulation of the principles, they are not regarded as the last word.

[33] Leiden Recommendations, *supra* note 5, at 543, para. 47.

[34] Bethlehem, *supra* note 1, at 776, princ. 12.

[35] *See* Chatham House Principles, *supra* note 3, at 971, princ. G; Leiden Recommendations, *supra* note 5, at 541, para. 36.

[36] *See* Chatham House Principles, *supra* note 3, at 971, princ. G; Leiden Recommendations, *supra* note 5, at 540, para. 33.

[37] The term *Policy Recommendations* in the title of the Leiden text does not imply that those "recommendations" concerning the use of force in self-defense were intended to address the future development of the law.

[38] LEWIS CARROLL, THE HUNTING OF THE SNARK (1876) (statement of the Bellman).

[39] Bethlehem, *supra* note 1, at 770.